No. 88-331

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL LANE, MICHAEL O'LEARY, and RICHARD W. DeROBERTIS,

Petitioners,

vs.

JAMES DAVENPORT, CHARLES RICHMOND, HECTOR RIVERA, CARL LUCAS, ROGER PENNIE, CHARLES TERRY, and MARK McBRIDE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the determination that conditions of incarceration violate the Eighth Amendment's proscription against cruel and unusual punishment is a question of law subject to *de novo* review by a court of appeals.

II. Whether petitioners waived their argument that such a determination is a question of law before the court of appeals.

III. Whether petitioners denied respondents their right to be free from cruel and unusual punishment under the Eighth Amendment as a matter of law.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I.	
WHETHER CONDITIONS OF INCARCERATION VIOLATE THE EIGHTH AMENDMENT'S PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT IS A QUESTION OF LAW AND NOT OF FACT	6
II.	
THE DEFENDANTS DID NOT WAIVE THE ISSUE OF THE APPROPRIATE STANDARD OF REVIEW	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	PAGE
Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir. 1986)	7
Hartford Accident and Indemnity Co. v. Sullivan, 846 F.2d 377 (7th Cir. 1988)	10
Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 88 L.E.2d 405 (1985)	8
Mucha v. King, 792 F.2d 602 (7th Cir. 1986)	10
Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982)	6
Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)	6, 7
Statutes	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4)	2
28 U.S.C. § 2254(d)	8
42 U.S.C. § 1983	2, 3, 7
Other Authority	
Fed. R. Civ. Pro. 52	6, 7

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Petitioners, Michael P. Lane, Michael O'Leary and Richard DeRobertis, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on April 13, 1988, and modified on petitioners' petition for rehearing May 23, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 844 F.2d 1310 (7th Cir. 1988) and is attached

as an appendix. (App. A). The opinion was modified upon denial of petitioners' petition for rehearing. The order modifying the opinion, issued May 23, 1988, is attached as an appendix. (App. B). The opinion of the United States District Court for the Northern District of Illinois, issued January 30, 1987, is reported at 653 F. Supp. 643 (N.D. Ill. 1987), and is also attached as an appendix. (App. C).

JURISDICTION

The respondents' claim was brought under the Eighth and Fourteenth Amendments and 42 U.S.C. § 1983. The jurisdiction of the district court was based on the existence of a federal question. 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4). The basis of jurisdiction in the Court of Appeals was 28 U.S.C. § 1291. Jurisdiction in this Court vests pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Stateville Correctional Center is a maximum security prison operated by the Illinois Department of Corrections. Inmates who are found to have violated one of the rules or regulations in effect at Stateville may be placed in a segregation unit within Stateville. Those inmates placed in segregation have performed violent or disruptive acts within the institution. At all times relevant, inmates in the segregation unit were provided with one hour of exercise outside of their cell and one shower per week. In January, 1985, the segregation unit was moved to a newly constructed facility.

The respondent class of inmates brought this action under 42 U.S.C. § 1983 seeking damages and injunctive relief from petitioners, officials of the Illinois Department of Corrections. The class consisted of inmates incarcerated in the segregation unit at Stateville for 90 or more consecutive days. Respondents alleged that the conditions in the segregation unit, particularly with respect to the opportunity to exercise and shower, were so substandard as to violate the Eighth Amendment's proscription against cruel and unusual punishment. The named petitioners were Michael Lane, Director of the Illinois Department of Corrections; Richard DeRobertis, warden at Stateville at the time the action was filed; and Michael O'Leary, who succeeded DeRobertis as warden during the pendency of the case.

A jury trial was had on respondents' claim for damages. The jury awarded each named respondent one dollar in compensatory and one dollar in punitive damages. The district court set aside the jury's verdict, however, on

the ground that the petitioners were immune under the Eleventh Amendment from liability for damages.

The district court then entered judgment against the petitioners on the respondents' claims for injunctive relief. Based on the totality of circumstances, the court found that the provision of only one hour of exercise and one shower per week constituted cruel and unusual punishment. According to the court, limited access to exercise outside the cell and to showers amounted to deprivation of the basic necessities of life for inmates confined to segregation for more than ninety days. The district court ordered that inmates in segregation be provided with five hours of exercise outside their cells and three showers per week.

The petitioners appealed from the district court's judgment. The Court of Appeals reviewed the district court's judgment utilizing the "clearly erroneous" standard of review. App. at 7, 8, 12. The Court ruled that petitioners waived the question of whether the judgment was reviewable as a question of law rather than a question of fact by failing to raise the issue in their appellate brief. App. at 2-3. At the same time, the court acknowledged that petitioners did argue that the ultimate question, whether the conditions constituted cruel and unusual punishment, was not a question of fact. App. at 3.

Under the "clearly erroneous" standard, the Court of Appeals held that the district court's judgment was supported by the record as to the provision of only one hour of exercise outside the cell per week. App. at 7-8. The court rejected the district court's finding that the provision of only one shower per week constituted cruel and unusual punishment. App. at 12. Accordingly, the Court of Appeals affirmed that part of the injunction mandating

that inmates in segregation be given the opportunity to exercise outside their cells at least five hours per week, but vacated the part of the injunction requiring three showers per week.*

The petitioners respectfully pray for the issuance of a writ of certiorari to review that decision.

REASONS FOR GRANTING THE WRIT

Whether the determination that conditions of incarceration violate the Eighth Amendment is a question of law is, itself, a question of first impression in this Court. The court of appeals' utilization of the "clearly erroneous" standard in making this determination conflicts with the standard utilized by at least one other court of appeals. As a matter of law, the conditions at Stateville did not violate respondents' constitutional rights. The contrary determination by the court of appeals, and its use of an inappropriate legal standard, will have a significant and detrimental impact on the operation of penal institutions by petitioners and by other correctional officers throughout the country. For these reasons, the petitioners pray that a writ of certiorari issue to review the decision of the Seventh Circuit Court of Appeals.

* On petition for rehearing, the Court of Appeals deleted that part of the injunction pertaining to the provision of showers.

I.

WHETHER CONDITIONS OF INCARCERATION VIOLATE THE EIGHTH AMENDMENT'S PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT IS A QUESTION OF LAW AND NOT OF FACT.

The District Court found that the provision of one hour of exercise per week, given the totality of all the circumstances of incarceration in the segregation unit, constituted cruel and unusual punishment violative of the Eighth Amendment. On appeal, the Seventh Circuit Court of Appeals reviewed the decision of the district court as a question of fact reviewable under the "clearly erroneous" standard. The Court of Appeals held that the district court's decision must be upheld because it was supported by the evidence introduced at trial. The utilization of the "clearly erroneous" standard of Rule 52 of the Federal Rules of Civil Procedure was itself error by the Court. Fed. R. Civ. Pro. 52. The ultimate question of whether conditions of incarceration are violative of the Eighth Amendment is a question of law subject to *de novo* review by the Court of Appeals. Because the ultimate question is one of law, it was incumbent upon the Court of Appeals to make an independent assessment of whether the provision of one hour of exercise per week outside the cell was, given the totality of the circumstances, cruel and unusual punishment.

Rule 52 provides, in pertinent part, that "[f]indings of fact shall not be set aside unless clearly erroneous. . . ." The clearly erroneous standard, however, does not apply to conclusions of law. *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982).

This Court first addressed the issue of whether conditions of incarceration could constitute cruel and unusual punishment in *Rhodes v. Chapman*, 452 U.S. 337, 101 S.

Ct. 2392, 69 L.Ed.2d 59 (1981). In *Rhodes*, this Court held that conditions of incarceration would constitute cruel and unusual punishment when the conditions deprived the inmates of basic human necessities as measured by contemporary standards of decency. As noted by the Court of Appeals in the cause at bar, the *Rhodes* decision implicitly treats such a judgment as a question of law. The *Rhodes* Court accepted the district court's findings of fact, but subjected the district court's conclusion that the facts demonstrated cruel and unusual punishment to *de novo* review. Although the *Rhodes* Court did not specifically address the issue of whether such determinations are questions of law or fact under Rule 52, the Court's analysis indicates that such determinations are questions of law.

A similar analysis was utilized by the court of appeals in *Alberti v. Klevenhagen*, 790 F.2d 1220 (5th Cir. 1986). Plaintiff Alberti, representing a class of inmates, brought suit under 42 U.S.C. § 1983 against prison officials claiming that the conditions of incarceration constituted cruel and unusual punishment. The district court granted injunctive relief against the prison officials. On review, the court of appeals specifically addressed the appropriate standard for review. The court noted that findings of fact were reviewed under the "clearly erroneous" standard. Once the facts were established, the court ruled, the issue of whether the facts "constituted a violation of constitutional rights is a question of law that may be assailed anew upon appeal." 790 F.2d at 1225. The court elaborated:

> Thus, the existence of the challenged conditions in the jails presents a question of fact to be reversed only if clearly erroneous; we bring our own judgment to bear on whether these conditions constitute cruel and unusual punishment.

Id. The decision in *Alberti* is contrary to the decision rendered by the court of appeals in the cause at bar.

This Court has not specifically addressed the question presented by the cause at bar. Prior decisions of the Court on related issues support the principle that the question of whether conditions of incarceration constitute cruel and unusual punishment is a question of law. In *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed. 2d 405 (1985), the Court held that the "voluntariness" of a confession was a question of law for purposes of 28 U.S.C. § 2254(d). Several factors were utilized in reaching this determination. "[A]ssessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of 'voluntariness' ". 474 U.S. at ____, 106 S.Ct. at 453. Additionally, the "hybrid quality of the voluntariness inquiry (footnote omitted), subsuming as it does a 'complex of values' (citation omitted), itself militates against treating the question as one of simple historical fact." *Id.* The *Miller* Court concluded that once the underlying factual issues had been resolved, a state court which initially rules on the voluntariness of a confession is not in an appreciably better position to judge voluntariness than is the federal court which determines voluntariness in a habeas corpus proceeding.

The decision in *Miller* strongly supports the proposition that the question of whether conditions constitute cruel and unusual punishment is one of law. Assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue. Once the subsidiary facts of the conditions of incarceration have been found, the ultimate question of whether such conditions are unconstitutional is unrelated to witness credibility. Further, whether conditions are cruel and unusual subsumes a complex of values which are evolving as contemporary standards of decency evolve. Once the underlying factual issues are resolved, the court of appeals is in an equal position with

the district court to judge the constitutionality of conditions of incarceration.

As a matter of law, the totality of conditions presented in the cause at bar do not establish a violation of respondents' rights under the Eighth Amendment. The facts found by the district court do not, as a matter of law, demonstrate conditions which deprive respondents of the basic human necessities.

It is petitioners' contention that the appropriate standard of review for questions of whether conditions of incarceration violate the Eighth Amendment is review as a question of law. This question of first impression merits review by this Honorable Court.

II.

THE DEFENDANTS DID NOT WAIVE THE ISSUE OF THE APPROPRIATE STANDARD OF REVIEW.

The court of appeals ruled that petitioners waived the argument that the constitutionality of conditions of incarceration is a question of law. This ruling is incorrect as a matter of both fact and law.

In their briefs, petitioners argued specifically that the ultimate question of the constitutionality of the conditions at Stateville was a question of law. The court of appeals, in its decision, acknowledged that petitioners argued that the ultimate question was not one of fact. (App. at 3). Thus, the petitioners did, in fact, argue before the court of appeals that the constitutionality of the conditions of incarceration was a question of law and not of fact.

The error of which petitioners complain is the utilization of an incorrect standard of review by the court of appeals. The appropriate standard of review to be utilized by the court of appeals is not an "error" by the district

court which must be raised in the briefs in order to be preserved for consideration on review. It is incumbent upon the appellate court to utilize the correct standard of review. Thus, even where a party asserts an incorrect standard of review, the reviewing court will utilize the appropriate standard. *See generally, Hartford Accident and Indemnity Co. v. Sullivan*, 846 F.2d 377, 384 (7th Cir. 1988); *Mucha v. King*, 792 F.2d 602, 604 (7th Cir. 1986). The Court of Appeals erred in failing to conduct a *de novo* review of the district court's conclusion that, as a matter of law, the underlying facts demonstrated cruel and unusual punishment inflicted by the petitioners.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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INDEX TO APPENDIX

	PAGE
A— Opinion of the United States Court of Appeals for the Seventh Circuit, April 13, 1988	1
B— Order of the United States Court of Appeals for the Seventh Circuit Modifying Opinion in Response to Petition for Rehearing, May 23, 1988	14
C— Memorandum Opinion and Judgment Order of the United States District Court for the Northern District of Illinois, Eastern Division, January 30, 1987	15

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-1233

JAMES DAVENPORT, et al.,

Plaintiffs-Appellees,

v.

RICHARD DEROBERTIS, MICHAEL O'LEARY,
and MICHAEL P. LANE,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 4392—**William T. Hart**, *Judge.*

ARGUED JANUARY 8, 1988—DECIDED APRIL 13, 1988

Before CUMMINGS, POSNER, and CUDAHY, *Circuit Judges.*

POSNER, *Circuit Judge.* This class action on behalf of prisoners confined in the segregation unit at Stateville, the State of Illinois' maximum-security prison, charges that living conditions in the unit are so substandard as to be a form of cruel and unusual punishment within the meaning of the Eighth Amendment, made applicable to the states by interpretation of the Fourteenth Amendment. (The average number of prisoners confined in segregation at Stateville is 225, but this suit is limited to those confined there for more than ninety consecutive days.) A jury agreed, and awarded nominal damages to

the class. The district judge set aside the award of damages on the ground that the defendants (Illinois correctional officials) were immune from liability for damages, but he entered an injunction which requires the defendants to provide "every Stateville segregation inmate who has been confined in segregation for 90 or more consecutive days the opportunity to shower at least three times each week and to exercise outside of his cell at least five hours each week." However, if the "inmate violates prison rules during his exercise or shower period, he may be denied the exercise or shower rights provided herein for a reasonable period of time pursuant to regulation approved by this court." 653 F. Supp. 649 (N.D. Ill. 1987).

The defendants' challenge to the district court's decision is a narrow one. They do not challenge the jury's finding that the conditions of segregated confinement at Stateville violated the Eighth Amendment. They do not argue that the district judge should have paid no attention to the finding because ultimately he determined that the defendants were immune from liability for damages and set aside the jury's verdict. A public official's immunity in a suit for damages is, normally, immunity from trial, not just from the award of damages. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Green v. Carlson*, 826 F.2d 647, 651 (7th Cir. 1987). If there are factual disputes that cannot be resolved without a trial, then trial there must be, *id.* at 652; but there was no trial on immunity here; after the trial the judge decided that the defendants were entitled to immunity after all, and set aside the jury's verdict. But the defendants do not argue that, by doing this, he deprived the jury's finding of liability of binding force in the injunction suit. They easily could so argue, as we shall see.

Nor do they argue that the ultimate question in an Eighth Amendment case is a question of law for the judge to decide rather than a question of fact for the jury. The question whether a rule of law has been violated—a question that requires applying the rule to the facts—is normally treated as a question of fact, see, e.g., *Mucha v.*

King, 792 F.2d 602, 605 (7th Cir. 1986), not because it *is* a question of fact (it isn't) but as a way of expressing a decision to leave the answer to the trial judge or jury to make, subject only to limited appellate review. The defendants miss this point in arguing, half-heartedly, that ultimate questions are not questions of fact. They base this argument on a case, no longer authoritative, which had held on the basis of a decision later expressly overruled by the Supreme Court in *Pullman-Standard v. Swint*, 456 U.S. 273, 285-86 (1982), that the question of discrimination in a Title VII case is one of law rather than of fact. See *Stewart v. General Motors Corp.*, 542 F.2d 445, 449 (7th Cir. 1976).

There are exceptions to the principle that ultimate questions are deemed questions of fact, an example being the question of actual malice in defamation cases; many of the exceptions are discussed in *Miller v. Fenton*, 474 U.S. 104 (1985), and *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505-11 (1984). The defendants do not argue that this case falls within one of the exceptions, though in *Rhodes v. Chapman*, 452 U.S. 337 (1981), the Supreme Court had implicitly treated the question whether particular prison conditions amounted to cruel and unusual punishment as one of law, see *id.* at 347, 352; none of the opinions in that case, however, discusses the standard of review. Several lower-court decisions treat the question as one of fact, but again without discussion. See, e.g., *Shrader v. White*, 761 F.2d 975, 980 (4th Cir. 1985); *Blake v. Hall*, 668 F.2d 52, 54-55 (1st Cir. 1981); cf. *Joseph v. Brierton*, 739 F.2d 1244, 1246 (7th Cir. 1984). We need not try to resolve the issue, given the defendants' failure to raise it.

All that the defendants are arguing is that the most the Constitution guarantees the segregated inmates of Stateville under current conditions in the segregation unit—a vital qualification, as will shortly appear—is one hour of exercise outside the cell, and one shower, per week, and hence that the injunction is too severe. In so arguing the defendants may seem to have overlooked the possibility that the injunction might be intended to be more severe

than the Constitution, in order to rectify more effectively the constitutional violations that the jury found and that the defendants no longer contest. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 687 (1978). But we do not understand the injunction to reflect such a design; it seems rather to reflect the district court's view of the constitutional minimum in the circumstances.

The defendants' challenge to the terms of the injunction may seem inconsistent with their failure to challenge the jury's finding of a constitutional violation. But as they point out, much of the evidence on which that finding was based concerned conditions in F-House, the building that housed the segregation unit until shortly before the trial. Conditions in F-House, an old unit, were very bad. Not only were the cells small (4′ 9″ by 10′ 6″), but they were dirty and roach-infested, toilets were frequently backed up, and food was served to the inmates cold. By the time of trial all the inmates had been moved to a new segregation unit, I-House, and not only is I-House newly built and modern but its cells measure 7′ 2″ by 13′ 2″, giving them almost twice the square footage as the cells in F-House (94 square feet versus 50 square feet). There is no evidence of unsanitary conditions or unheated food in I-House; and although the doors to the cells have only narrow slits rather than the barred windows of the doors to F-House's cells, each cell in I-House has an outside window at the back. The windows in the doors of F-House's cells, combined with the circular shape of F-House, made F-House a more sociable habitat for the inmates than I-House, but also and by the same token made the inmates more rowdy and by doing so may have been indirectly responsible for much of the filthy condition of the cells. Rowdy inmates are given to throwing food out of their cells, stopping up toilets, and preventing maintenance staff from entering.

There was testimony, both lay and medical, including testimony by the medical director of the Illinois Department of Corrections, Dr. Shansky, that four to seven hours of exercise outside the cell, and three showers, are the weekly minimum necessary to prevent serious adverse effects

on the physical and mental health of inmates confined, as these inmates are, in what realistically is a form of solitary confinement. It is true that each cell contains a sink in which the inmate can wash himself as often as he wants and that the cells in I-House are large enough for the inmate to engage in various forms of exercise, including push-ups, sit-ups, step-ups, and running in place. It is also true that the inmates are allowed to leave their cells for a variety of reasons, such as to use the law library, see visitors, consult with lawyers and other counselors, and visit the medical unit. But these excursions consume in the aggregate only two to three hours per week on average, and the degree of constraint is considerable. A visit to the law library, for example, means being escorted in handcuffs to a caged carrel in the library—not browsing in stacks or working at a library table in a reading room.

Confinement in segregation is usually for a much shorter time than the prisoner's full term. Whereas most Stateville prisoners are violent criminals serving long terms (one-third are serving terms for murder and three-fourths have been convicted of murder at some point in their criminal careers), most prisoners confined to segregation serve only a few months there (at least consecutively). But the plaintiff class is, as noted earlier, limited to prisoners who served more than ninety consecutive days in segregation, and several of the class members spent more than a year there and one spent more than two and a half years there.

Confinement in Stateville's segregation unit involves considerable isolation, sometimes for protracted periods; and the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total. Of course, it is highly probable that the experience of being imprisoned inflicts psychological damage whether or not the prisoner is isolated, so it is only the marginal psychological damage from segregation that is relevant. And the infliction of disutility, to borrow a convenient

economic term, is one of the objectives of criminal punishment; only if the only objective of punishment were incapacitation could it be argued that living conditions should be as comfortable in prison as outside. The Eighth Amendment has, however, been interpreted to place limitations on the harshness of prison conditions, and the defendants as we have said do not quarrel with the propriety of the jury's having determined in this case that conditions in the segregation unit at Stateville exceeded those limitations. The principal—though not, as it seems to us, an insuperable—difficulty in using this proposition to ground the injunction is that most of the testimony at trial was directed toward the totality of conditions in segregation at Stateville, including the small size and filthy conditions of the cells in F-House. The totality is of limited significance in appraising the injunction. The injunction looks to the future; and the future is I-House, not F-House.

The difficulty is compounded by the statement in the district judge's opinion that he "should accept the jury's findings as predicate for equitable relief." 653 F. Supp. at 663. If the judge meant by this that he was required to issue the injunction that would have been appropriate if I-House had never been built—appropriate if the members of the plaintiff class were still confined in F-House—he was wrong. It is true that if the jury's finding on liability had been valid, he could not have refused to issue an injunction on the ground that he disagreed with the jury's finding. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir. 1986); *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 355 (7th Cir. 1987). The jury's verdict would bind the judge under the doctrine of collateral estoppel (thus demonstrating that the doctrine does not require a final judgment in the conventional sense). See Restatement, Second, Judgments § 13 and comment g and illustration 3; *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961) (Friendly, J.). But he set aside the jury's verdict. It is true that he did this not because he disagreed with its findings but because he thought that the defendants had immunity from dam-

ages liability. But by setting aside the verdict on a ground not challenged by the plaintiffs he deprived the findings of the collateral estoppel effect that they would otherwise have had. The plaintiffs had no right to a jury verdict, so how can they have a right to benefit from it? In any event, and more fundamentally, the judge was required to tailor the equitable relief to the actual circumstances before him, which included the circumstance that the prisoners are now housed in I-House.

Did he try to do this? A positive answer is strongly implied by his discussion of conditions in other prisons. See 653 F. Supp. at 663. A negative answer is weakly implied by his citation (also *id.*) to the page of *Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1092 (7th Cir. 1986), at which this court, while indicating that the district judge must make an independent judgment on equitable issues insofar as they are not identical to the legal issues determined by the jury, found that the legal and equitable issues in that case *were* identical. Maybe the district judge in this case thought the same thing, in which event he was wrong, because the jury did not purport to determine the equitable relief necessary to prevent the perpetuation or recurrence of the defendants' unlawful acts. But although the district judge's opinion could have been clearer on this important point, we conclude that he did make an independent judgment on the equitable relief necessary to secure the plaintiffs' rights *in I-House*, which is all that is relevant since no one suggests that the defendants might decide to move the segregation unit back to F-House.

We are not disposed to quarrel with the district judge's conclusion that to allow even I-House inmates only one hour of exercise out of the cell per week (the defendants' position) would fall below the minimum decencies that the Eighth Amendment requires of incarceration, especially since the defendants' concession requires us to treat this as a question of fact and therefore to defer broadly to the answer given by the district judge. There was extensive evidence, much of it conflicting, and we cannot say that in sorting through it the judge committed clear error.

Of course, as the defendants argue, an inmate can preserve his cardiovascular fitness and overall muscle tone by running in place or by engaging in other forms of exercise that are feasible without leaving the cell; but this misses the point. The opportunity to exercise or even just to stand around, outside, in the company of other prisoners, is the inmate's principal break from what otherwise is solitary confinement except for his limited opportunities to visit other parts of the prison on specific and tightly supervised missions. With only one hour of exercise outside the cell a week and only two other hours outside the cell, an inmate spends 165 out of 168 hours in a 90-square-foot cage. That is too little, or so at least the district judge could find without committing a clear error.

This conclusion depends, obviously, on the proposition that the requirements of the Eighth Amendment have changed over time; for it was not so long ago that solitary confinement—*real* solitary confinement—was considered neither unusual nor especially cruel. But "the Eighth Amendment has not been regarded as a static concept." *Gregg v. Georgia*, 428 U.S. 153, 172-73 (1976) (plurality opinion); see also *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Rhodes v. Chapman*, *supra*, 452 U.S. at 346 ("No static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society' "). It would not be an arid literalism—it would be a bold interpolation—to read the amendment as if the words "as so regarded on the date of this enactment" followed the words "cruel and unusual punishments." The term "cruel and unusual punishments" was taken verbatim from the English Declaration of Rights of 1689, see Granucci, "*Nor Cruel and Unusual Punishments Inflicted:*" *The Original Meaning*, 57 Calif. L. Rev. 839, 852-53 (1969), so if a historical view is taken perhaps the proper reference date is a century before the enactment of the Eighth Amendment. Like much of the rest of the Bill of Rights, the Eighth Amendment would be obsolete if its meaning

were thought bounded by the mental horizons of its eighteenth-century framers, broad as those horizons were.

The term "cruel and unusual punishments" is relative rather than absolute. The conditions in which prisoners are housed, like the poverty line, is a function of a society's standard of living. As that standard rises, the standard of minimum decency of prison conditions, like the poverty line, rises too.

A knowledgeable witness testified that he knows of no other prison in the United States, including the federal penitentiary at Marion, Illinois—the nation's highest-security prison—that allows inmates of its segregation unit so little time for out-of-cell exercise. The defendants could have presented a witness who would testify that there were other such prisons—or, if not, still that Stateville is at or above the constitutionally permissible minimum. It cannot be right that the least comfortable prison conditions in the United States automatically violate the Constitution, cf. *Rummel v. Estelle*, 445 U.S. 263, 281-82 (1980); for then, by the inevitable progression of successive cases, *all* conditions other than the most comfortable would be found to violate it. The defendants did not present such a witness, however, and the district judge was entitled to draw the natural inference from their failure to do so. Nor do the defendants argue that the statement in *Rhodes* that opinions of expert witnesses do not establish constitutional minima, see 452 U.S. at 348 n. 13, precludes the taking of expert testimony on questions (such as psychological harm, or comparative prison practices) logically related to the constitutional judgment. From the evidence before him the judge could reasonably conclude that the defendants must provide each inmate in I-House with at least five hours of exercise time per week in order to comply with the Eighth Amendment. The exception for fractious inmates protects the defendants' legitimate interest in security, well illustrated by *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985); it is unfortunate but unavoidable that the exception may itself engender litigation by inmates claiming that the defendants are misapplying it.

Our conclusion that the district judge was authorized to establish a five-hour minimum for exercise is bolstered by other judicial decisions on prisoners' exercise rights. The decisions are fact-specific; not surprisingly, the federal courts have not attempted to specify detailed guidelines for the administration of state prisons. Nevertheless we are impressed by the number of decisions that hold or suggest that a failure to provide inmates (confined for more than a very short period—a qualification that distinguishes such cases as *Harris v. Fleming*, No. 86-2549, slip op. at 7-8 (7th Cir. Feb. 10, 1988), and *Shelby County Jail Inmates v. Westlake, supra*, 798 F.2d at 1089) with the opportunity for at least five hours a week of exercise outside the cell raises serious constitutional questions. See, e.g., *French v. Owens*, 777 F.2d 1250, 1255-56 (7th Cir. 1985); *Ruiz v. Estelle*, 679 F.2d 1115, 1151-52 (5th Cir. 1982); *Campbell v. Cauthron*, 623 F.2d 503, 507 (8th Cir. 1980) (pretrial detainees); *Spain v. Procunier*, 600 F.2d 189, 199-200 (9th Cir. 1979); *Sweet v. South Carolina Dept. of Corrections*, 529 F.2d 854, 865-66 (4th Cir. 1975); *Frazier v. Ward*, 426 F. Supp. 1354, 1367-69 (N.D.N.Y. 1977); cf. *Caldwell v. Miller*, 790 F.2d 589, 601 (7th Cir. 1986). We do not suggest that this is always and everywhere the constitutional minimum; much less may suffice when the period of incarceration is brief. But a judge who, on an adequate record, requires this level of exercise opportunity has not exceeded the outer bounds of permissible interpretation of the Eighth Amendment.

In contrast, we do not think that the provision of the injunction requiring the defendants to allow the inmates to take three showers a week has adequate support in the record or in constitutional doctrine. No doubt Americans take the most showers per capita of any people in the history of the world, but many millions of Americans take fewer than three showers (or baths) a week without endangering their physical or mental health, and abroad people as civilized and healthy as Americans take many fewer showers on average, as every tourist knows. Any inmate of Stateville's segregation unit who wants to keep

as clean as a free person can wash himself daily, or if he wants hourly, in the sink in his cell—a point ignored by Dr. Shansky, the medical expert for the plaintiff class on the issue of showers. There is evidence that inmates of the segregation unit consume on average more medical services than nonsegregated inmates, but there is no evidence connecting this datum to the number of showers for each group. The importance of the daily shower to the average American is cultural rather than hygienic; as Dr. Shuman, the defendants' expert, testified, "I know of nothing that says that a shower is necessary more than one day a week. I believe in this culture it is done that way but I don't know of any medical need for it." The judge was not obliged to believe the defendants' witness, but Dr. Shansky made the same point as Shuman when he said that being able to take only one shower a week makes inmates feel "less than human." While there is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant), see, e.g., Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450 (1983), we have not found any corresponding literature on the effects of limiting the number of showers that prisoners may take. The deprivation merely of cultural amenities is not cruel and unusual punishment. *Harris v. Fleming*, *supra*, slip op. at 6-8. Moreover, the evidence on this aspect of the case was heavily contaminated by evidence about conditions in F-House; for of course the filthier the conditions under which inmates are living, the greater their need for frequent showers.

There would be a special irony in requiring the State of Illinois to provide the security escorts and other services and facilities necessary to enable the most incorrigible of its prisoners to take three showers a week, when many law-abiding poor people in dilapidated public housing projects do not have working showers. The necessity to make painful tradeoffs between competing public projects in an era of governmental fiscal scarcity counsels caution in the formulation of equitable relief requiring public expenditures.

Preston v. Thompson, 589 F.2d 300, 303 (7th Cir. 1978), upheld a district court's injunction that required a minimum entitlement of two showers a week, but the circumstances were different. The prison officials had imposed a prison-wide deadlock or lockdown, with drastic consequences for all prisoners. The district court thought the prison was too slow in returning to normalcy, and the two-shower provision was intended to nudge the defendants in that direction. The plaintiffs in our case rely heavily on a district court decision, *Lightfoot v. Walker*, 486 F. Supp. 504, 511 (S.D. Ill. 1980), which finds that allowing inmates only one shower per week "promotes deterioration of inmates physically." But the district court's opinion in that case does not explain the basis of its finding or indicate whether the deterioration resulted solely from the infrequency of the showers or from that in combination with a failure to allow the inmates more than an hour of exercise per week. On the record in the present case one shower a week for inmates of Stateville's segregation unit is constitutionally sufficient and the district judge's contrary finding is clearly erroneous. The injunction is modified by substituting "once" for "three times" and as modified is affirmed. No costs on appeal.

MODIFIED AND AFFIRMED.

CUDAHY, *Circuit Judge*, concurring in part and dissenting in part:

After marching up the hill to uphold very ably and convincingly the five hour exercise prescription, the majority marches down the other side to somehow find three showers clearly erroneous. This is puzzling, because in the minds of most Americans there is some considerable linkage between occasions of vigorous exercise and the need for showers. In addition, I doubt that American tourists, whose observations the majority cites, would recommend importing at random foreign standards of balneation, even

into maximum security prisons. As a matter of fact, the majority may be maligning foreigners since the Japanese, for example, have traditionally surpassed Westerners in their zeal for frequent bathing.

Whatever may be the dubious logic of the majority's stand on showers, a one-shower-a-week regimen takes us back in memory to the days of the Saturday night bath in a washtub heated on a wood stove. But that is history. Indoor plumbing has now been with us for some years—even in prisons. I have the impression the jury in bringing in its verdict understood some of these things better than the majority.

No less an authority than Dr. Shansky, the medical director of the Illinois Department of Corrections, testified that three showers are the weekly minimum (in connection with adequate exercise) necessary to prevent serious adverse effects on the physical and mental health of inmates in what amounts to solitary confinement. On that basis alone, I have great difficulty in seeing how Judge Hart's conclusion can be called clearly erroneous. I therefore respectfully dissent on the shower reversal.

On another point, the majority says that, "the infliction of disutility . . . is one of the *objectives* of criminal punishment. . . ." *Supra* pp. 5-6 (Emphasis supplied). This sounds a bit ominous to me—assuming that I understand it. On that shaky premise, I would also most respectfully disagree on this point.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 23, 1988

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*

JAMES DAVENPORT, et al.,

Plaintiffs-Appellees,

No. 87-1233 v.

RICHARD DEROBERTIS, MICHAEL O'LEARY, and MICHAEL P. LANE,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 4392—**William T. Hart**, *Judge.*

ORDER MODIFYING OPINION IN RESPONSE TO PETITION FOR REHEARING

The petition for rehearing filed by the defendants on April 27, 1988, is granted, and the second to last sentence of the majority opinion is amended to read as follows:

> The injunction is modified to delete the reference to showers and as modified is affirmed.

APPENDIX C

[Dated January 30, 1987]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 4392

JAMES DAVENPORT, CHARLES RICHMOND, HECTOR RIVERA, CARL LUCAS, ROGER PENNIE, CHARLES TERRY, and MARK MCBRIDE,

Plaintiffs,

v.

RICHARD W. DEROBERTIS, MICHAEL LANE, and MICHAEL O'LEARY,

Defendants.

MEMORANDUM OPINION AND JUDGMENT ORDER

This is a class action for deprivation of plaintiffs' constitutional rights brought pursuant to 42 U.S.C. § 1983. Jurisdiction of the court is properly invoked pursuant to 28 U.S.C. § 1343 and is not disputed. Plaintiffs seek damages individually and injunctive relief on behalf of a class of current and potential long-term segregation inmates at the Stateville Correctional Center ("Stateville") operated by the defendant officials of the Illinois Department of Corrections where plaintiffs were or are now confined. Plain-

tiffs seek to redress alleged individual and class violations of their eighth amendment rights because they contend that they were incarcerated under conditions that subjected them to pain, physical deterioration and emotional distress caused by a lack of adequate showers and physical exercise.

On March 31, 1986, for the purpose of seeking injunctive relief, plaintiffs Rivera and Lucas were certified as representatives of the following class: all present and future Stateville inmates confined to Stateville segregation for 90 or more consecutive days.

The defendants in this action are Richard W. DeRobertis, former Warden of Stateville, Michael P. Lane, Director of the Illinois Department of Corrections, and Michael O'Leary, current Warden of Stateville. Each defendant was sued for damages and injunctive relief in his individual capacity. After trial, plaintiffs moved to amend the complaint to allege that each defendant was also sued in his official capacity. The charges and issues have essentially related to official conduct. *See Walker v. Rowe*, 791 F.2d 507, 507 (7th Cir.), *cert. denied*, 107 S.Ct. 597 (1986). Inasmuch as no objections have been made to this amendment and because no other or different proofs would have been presented, this motion is granted. The amendment, however, has eleventh amendment implications which must be considered.

Inasmuch as damages were sought, the liability and damage issues were properly tried to a jury. The matter of injunctive relief, if any, was reserved for decision by the court.

The jury was asked to return a special verdict answering seven questions and to determine damages. In response to the liability questions, the jury found that, under the totality of the circumstances in this case: (1) providing only one shower per week constitutes cruel and unusual punishment; (2) providing only one hour of out-of-cell exercise per week constitutes cruel and unusual punishment; (3) each defendant was personally responsible for cruel and

unusual punishment; (4) each defendant acted with deliberate indifference or reckless disregard for the health and well-being or constitutional rights of plaintiffs; (5) plaintiffs sustained injury or damages; (6) defendants' acts or conduct was the proximate cause of plaintiffs' injury or damages; (7) there exists a pattern or custom of defendants which has resulted in the denial of rights to be free from cruel and unusual punishment. Each of the named plaintiffs was awarded one dollar compensatory and one dollar punitive damages against each defendant.

Defendants filed timely motions for a directed verdict, for judgment notwithstanding the verdict or, in the alternative, for a new trial. The parties were also directed to separately brief the issue of relief should the post-trial motions be denied. This was done, and the matter was set for a status hearing on December 22, 1986. At that time the parties were asked by the court whether they wished to offer any additional evidence directed solely to the question of appropriate relief. Each side indicated a desire to submit the case to the court on the record made at the trial of the liability and damage issues and on the briefs submitted without any additional evidence.

The matters to be resolved are (1) the post-trial motions, (2) defendants' claims of qualified immunity, (3) the application of the eleventh amendment, and (4) the nature of any injunctive relief.

I.

Post-Trial Motions

A. Directed Verdict— Judgment Notwithstanding the Verdict

The legal standard applicable to defendants' motion for a directed verdict or judgment notwithstanding the verdict is clear. "The motion 'should be denied where the evidence, along with the inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion, is such that reason-

able men in a fair and impartial exercise of their judgment may reach different conclusions.' " *Freeman v. Franzen*, 695 F.2d 485, 488 (7th Cir. 1982), *cert. denied*, 463 U.S. 1214 (1983) (quoting *Konczak v. Tyrrell*, 603 F.2d 13, 15 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980)). The court must "resolve all conflicting evidence in favor of the jury's verdict," and may not "reweigh the evidence or make [its] own determinations of credibility." *Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1087 (7th Cir. 1986). The motion must be denied where the evidence includes "disparate accounts of the underlying incident[s]," raising questions of credibility that only the jury may resolve. *Freeman*, 695 F.2d at 488; *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1227 (D.C. Cir. 1984) ("if there is substantial conflicting evidence, the judgment n.o.v. motion must be denied.").

There is no dispute as to the applicable constitutional standard. As stated in the instructions to the jury: "prison conditions can be cruel and unusual when they deprive inmates of the minimal civilized measure of life's necessities," when they inflict "pain without justification," or when they violate "the evolving standards of decency that mark the progress of a maturing society." The jury was instructed to make its determinations based on the "totality of the circumstances." Defendants did not object to these instructions, and they are supported by precedent. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Caldwell v. Miller*, 790 F.2d 589, 600 (7th Cir. 1986).

The jury had before it the following uncontested facts which were part of the final pretrial order:

1. Stateville is a maximum security prison operated by the Illinois Department of Corrections. The segregation unit at Stateville is a maximum security unit that houses those inmates who have been found guilty of violating prison rules and regulations. At any one time approximately 225 single-celled inmates are confined in segregation. Prior to January 1985, the segregation unit was in F-House. In January, 1985, the segregation unit was moved to I-House, a newly built segregation unit.

2. The cells in F-House are virtually identical to each other. The dimensions of the typical F-House cell are somewhat pie-shaped 10'6" × 4'9" × 10'6". Available unblocked floor space consists of two rectangular areas measuring approximately 3' × 6½', and 40" × 30".

3. I-House has 24 wings, each wing containing 12 or 13 cells. The cells in I-House are virtually identical to each other. The dimensions of the typical I-House cells are 7'2" × 13'2". Available unblocked floor space consists of a rectangular area approximately 10'2" by 4'9".

4. There is one shower stall in each wing which measures 4'3½" × 7'. It serves the 12 or 13 cells in its wing.

5. The typical I-House cell has a metal door through which the inmate can peer at certain times through a slot 29" from the floor. The cell walls and floor are made of concrete. The typical cell has a window to the outdoors that measures 48" × 11", which can be opened and closed by the inmate.

6. The segregation unit inmates are provided with a stool fixed to the floor, bed (including mattress, pillow, and blanket), sink, toilet, soap, towel, and shelf. The sink has running water. Inmates are allowed to have personal toiletry items in their cells. The prison provides a laundry service for segregation inmates once a week.

7. The defendants, Michael Lane, Michael O'Leary, and Robert DeRobertis were at all times relevant to the lawsuit acting under color of the laws of Illinois and the rules and regulations of the Illinois Department of Corrections. Michael Lane is the Director of the Illinois Department of Corrections. Richard DeRobertis was Warden at Stateville until November 1983, at which time Michael O'Leary became Warden.

8. Illinois Department of Corrections Administrative Rule 804, and Department of Corrections Rules, Section 504.620 (which superseded AR 804), both provide that segregation unit inmates shall be provided with not less than one shower and one hour of recreation or exercise out-

side their cells a week. Defendant Michael Lane was personally involved in the adoption of these rules. The warden at Stateville has discretion to provide more than the minimum amounts of showers and exercise.

9. Out-of-cell recreation for segregation inmates consists solely of time spent in one of two outdoor recreation yards. Each yard is blacktopped and enclosed by a chain-link fence. The dimensions of the irregularly shaped F-House yards are approximately 63′ × 18′ × 40′ × 42′. The dimensions of the five sides yards at I-House are approximately 55′ × 45′ × 32′ × 41′. Both yards have basketball hoops.

10. The procedure for giving segregation inmates their yard time consists of the following. There are two nearly identical outdoor yards at I-House. At any one time, each yard can accommodate up to 10 inmates. Four exercise periods are scheduled each day between 8:30 a.m. and 2:30 p.m. Four guards are required at any given time to provide yard time to those segregation inmates who wish to use it. Two guards cuff the inmates and escort them to their respective yards. Two guards stand watch over the yards in a nearby tower.

11. While the segregation unit was in F-House, segregation inmates were generally provided one shower a week on a scheduled basis. The F-House shower room is located beneath the main floor in the center of the round house. It measures 20′ × 8′. There is also a drying room measuring 10′ × 10′ and an access area measuring 20′ × 4′.

12. Segregation unit inmates are provided no indoor recreation outside of their cells.

13. Segregation unit inmates are locked in their cells 24 hours a day except when they have yard time, take a shower, go to the hospital, see visitors, visit the law library, attend administrative proceedings, appear before the parole board, visit their counselors, or appear in court by means of a writ of habeas corpus.

14. Segregation inmates in I-House can and do at least some limited forms of exercise in their cells such as push-ups, sit-ups, steps-ups, and running in place, although some inmates do not do such exercise.

15. Segregation inmates can and do use the sinks in their cells to wash themselves, although some inmates do not.

16. Medical technicians visit the segregation inmates in their cells on a regular basis and will respond to those inmates who request medical attention. Physician attendants also see to the inmates' medical needs. There is a medical doctor and psychiatrist available for inmates. A clinic and hospital are also available for segregation inmates.

17. The individual plaintiffs were confined to the Stateville segregation unit during the following periods:[1]

Richmond	7/82	to	1/84
Pennie	4/83	to	1/84
Davenport	2/83	to	6/84
Rivera	5/83	to	5/84
Lucas	6/83	to	1/86
Terry	8/82	to	12/84
McBride	7/83	to	12/84

The jury had before it the "Standards for Adult Correctional Institutions" (second edition) ("A.C.A.") which state with respect to showers and exercise as follows:

> 2-4224 Written policy and procedure provide that inmates in segregation have the opportunity to shave and shower at least three times per week. (Essential)
>
> DISCUSSION: Inmates in segregation should have the opportunity to maintain an acceptable level of personal hygiene, including the opportunity to shave and shower at least three times per week, unless these procedures present an un-

[1] Two plaintiffs were in custody at the time of trial.

due security hazard. If conditions permit, these inmates should be able to shower daily.

2-4232 Written policy and procedure provide that inmates in segregation receive a minimum of one hour per day, five days per week, of exercise outside their cells, unless security or safety considerations dictate otherwise. (Essential)

DISCUSSION: Opportunities to maintain physical fitness are critical for inmates in disciplinary detention and administrative segregation because of the obvious limitations on their movement. They should be provided the opportunity to exercise in an area designated for this purpose, with opportunities to exercise outdoors, weather permitting, unless security or safety considerations dictate otherwise. A written record should be kept of each inmate's participation, or lack of it, in the exercise program. Reasons for the imposition of constraints should be documented.

The evidence also included the "Standards for Health Service in Prisons" published in July 1979 by the American Medical Association which states with respect to exercise as follows:

161 Written policy and defined procedures outline a program of exercising and require that each inmate is allowed a daily minimum of one hour of exercise involving *large muscle activity*, away from the cell, on a planned, supervised basis.

Discussion: It is recognized that many facilities do not have a separate facility or room for exercising. The dayroom adjacent to the cell may be used for this purpose. The dayroom meets compliance, *if* planned, programmed activities are directly supervised by staff and/or trained volunteers; otherwise, the designated hour would not be different from any of the other hours of the day. Examples of large muscle activity include

> walking, jogging in place, basketball, ping pong, and isometrics. Television and table games do not meet compliance.

The evidence disclosed that Stateville segregation inmates have been subjected to isolation, locked in their cells almost 24 hours a day for periods up to two years. At most, they are allowed out of their cells for two or three hours a week. There was evidence that their cells are dirty and roach-infested. Sinks and toilets often backed up, flooding the gallery with filth. Water was frequently cold, and the food was usually cold. James Davenport said the cell house smelled like a garbage dump. Hector Rivera said it smelled like spoiled milk. Exercise periods and showers were often denied for periods of several weeks, and they never were allowed more than once a week.

Plaintiffs testified that they experienced skin disorders, head and back pains, and musculo-skeletal problems that they had not had before segregation, and that improved when they were released from segregation. Stateville medical personnel testified that inmates in segregation were less healthy than inmates in the general population.

Dr. Harold Shuman, Stateville's Medical Director, testified that segregation inmates consume 25% more medical services than inmates in the general population. Stateville's health services reports show that generally 15% to 30% (and in one month 71%) of the inmates examined each month by physician's assistants were segregation inmates, although the segregation unit housed only 10% of the more than 2,000 inmates of Stateville.

Plaintiffs (Pennie, Davenport, Rivera, McBride, and Richmond) experienced sleep disorders, nightmares, violent fantasies, and thoughts of suicide while in segregation, and two of them (Davenport and McBride) sought psychiatric counseling. Plaintiffs witnessed bizarre and self-destructive behavior of other inmates in segregation. Defendant DeRobertis testified that suicide and suicide attempts are more common in segregation than in the general population.

Dr. Ronald Shansky, Medical Director of the Illinois Department of Corrections, testified that permitting segregation inmates only one hour of out-of-cell exercise and one shower per week is "medically unacceptable." He stated that limiting inmates to one shower per week increases the likelihood of skin disease and infection, and makes inmates feel "less than human." Dr. Shansky considers three showers per week "essential" to maintain inmates' mental and physical well-being. Dr. Shansky also testified that limiting inmates to one hour per week of out-of-cell exercise is "medically unacceptable" because it can lead to deterioration of the cardio-vascular system, hardening of the arteries, atrophy of muscles, musculo-skeletal problems, and adverse psychological effects. Dr. Shansky stated that limiting inmates to one shower and one hour of exercise per week would increase inmates' need for health care. Shansky testified that his conclusion that such a limitation on showers and exercise was "medically unacceptable" at Menard in 1976 is equally applicable at Stateville in 1986.

Professor Leon McConville testified, based on his study of penological matters, that prolonged idleness and isolation can cause mental illness and physical deterioration. He stated that limiting inmates to one hour per week of out-of-cell exercise carries grave risks with no penological justification.

Dr. Terry Brelje said that there is a correlation, noted in the professional literature, between prolonged isolation and various psychopathological symptoms.

It is undisputed that Stateville's segregation unit allows inmates far less out-of-cell exercise than other segregation units in maximum security prisons. Dr. John Harness testified that every segregation unit he has visited provides more outside exercise than Stateville.

Professor McConville testified that the general practice in maximum security prisons in civilized countries is to permit all inmates 5-7 hours of exercise per week, and that he knows of no other prison in a civilized country

that limits inmates to one hour of exercise per week. Every federal penitentiary, including the "Level VI" prison at Marion, Illinois, permits segregation inmates more hours of out-of-cell exercise per week. McConville concluded that Stateville's exercise limitation is without penological justification.

The evidence supports the jury's finding of cruel and unusual punishment. " 'Lack of exercise may certainly rise to a constitutional violation.' " *Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1089 (7th Cir. 1986) (quoting *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985)). The jury's verdict is consistent with cases holding similar limitations on out-of-cell exercise to be cruel and unusual punishment. *Campbell v. Cauthron*, 623 F.2d 503, 507 (8th Cir. 1980) (each inmate that is confined to his cell for more than sixteen hours per day shall ordinarily be given the opportunity to exercise for at least one hour per day outside the cell); *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979) ("There is substantial agreement among the cases in this area that some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates."); *Lightfoot v. Walker*, 486 F. Supp. 504, 511 (S.D. Ill. 1980) ("one shower and one hour of exercise per week . . . is not a medically acceptable frequency or duration of showers or exercise; it promotes deterioration of inmates physically."); *Hutchings v. Corum*, 501 F. Supp. 1276, 1294 (W.D. Mo. 1980) ("in order to avoid inhumane conditions a minimum of one hour of exercise per day for each inmate outside the cell must be provided"); *Bono v. Saxbe*, 462 F. Supp. 146, 149 (E.D. Ill. 1978), *aff'd in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980) (finding "a minimum of four (4) hours weekly" of exercise to be constitutionally inadequate and ordering "that inmates in the Marion Control Unit be provided a minimum total of seven (7) hours per week for physical exercise"); *Frazier v. Ward*, 426 F. Supp. 1354, 1368 (N.D.N.Y. 1977) (finding "that the lack of adequate outside yard exercise in the open air may inflict, depending on the strength of

the individual, grave physical and psychological harm upon the inmate"); *Conklin v. Hancock*, 334 F. Supp. 1119, 1122 (D.N.H. 1971) (ordering that plaintiff receive a daily shower and exercise period); *Morris v. Travisono*, 310 F. Supp. 857, 869 (D.R.I. 1970) (ordering a minimum of two showers a week and one hour a day of exercise).

In *Lightfoot v. Walker*, 486 F. Supp. 504, 511 (S.D. Ill. 1980), the court found that the same exercise and shower limitations challenged here violated the eighth amendment when used at Menard Correctional Center. A central issue in this case was whether Stateville's conditions are sufficiently different from Menard to render the *Lightfoot* panel's conclusions inapplicable at Stateville. The medical panel report relied upon by the *Lightfoot* court was introduced into evidence. That report concludes that limiting inmates to one hour of out-of-cell exercise and one shower per week is "medically unacceptable." Dr. Shansky, one of the authors of the medical panel report and now Medical Director of the Department of Corrections, testified that in his opinion, based upon his medical expertise and his knowledge about both Menard and Stateville, the exercise and shower limitations also are medically unacceptable at Stateville. The jury was entitled to believe him. The jury's finding of cruel and unusual punishment is supported by the evidence.

Defendants also argue that because plaintiffs did not present medical expert testimony establishing that their specific mental and physical ailments were caused by a lack of exercise and showers, the defendants are entitled to judgment notwithstanding the verdict.

Plaintiffs testified that they suffered emotional distress, humiliation, personal indignity, and dejection as a result of the denial of adequate out-of-cell exercise and showers. The jury was entitled to believe them. These effects are compensable actual injury under § 1983. *See Memphis Community School District v. Stachura*, 106 S.Ct. 2537, 2543 (1986) ("compensatory damages may include . . . 'personal humiliation, and mental anguish and suffering' ");

Carey v. Piphus, 435 U.S. 247, 264 (1978) ("mental and emotional distress . . . itself is compensable under § 1983"); *Crawford v. Garnier*, 719 F.2d 1317, 1324 (7th Cir. 1983) ("emotional distress, humiliation, personal indignity and physical injury" are "some of the elements of compensable injury").

Isolation in solitary confinement can cause compensable emotional damages even where there is no evidence that it caused mental or physical deterioration. *Chapman v. Pickett*, 801 F.2d 912, 916 (7th Cir. 1986) ("Chapman was kept in virtual isolation for nine months with severe restrictions on his mobility and daily routine. We cannot say that Chapman did not suffer actual damage.").

The jury was instructed that it could award nominal damages of one dollar if it found that "a plaintiff's right to be free from cruel and unusual punishment was violated," but that "the plaintiff has not sustained actual damages." Instructions, p. 28. Defendants did not object to this instruction, and it accurately states the law. Nominal damages "are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Memphis Community School District v. Stachura*, 106 S.Ct. 2537, 2544 n.11 (1986).

In *Madison County Jail Inmates v. Thompson*, 773 F.2d 834, 844 (7th Cir. 1985), the Seventh Circuit held that nominal damages are an appropriate remedy in an eighth amendment case where the plaintiffs fail to prove actual injury proximately caused by cruel and unusual punishment. Plaintiffs in that case challenged several conditions of confinement, including the lack of a "recreation or exercise program" at the jail. *Id.* at 836. They submitted expert testimony that the challenged conditions "would cause stress to anyone," *id.* at 840, and that "about ten percent of the population would react with significant emotional or mental difficulty." *Id.* The trial court found that the challenged conditions were cruel and unusual punishment, but that the plaintiffs had not proved that those conditions caused them actual injury. The court therefore

awarded nominal damages. The Seventh Circuit affirmed, reasoning as follows:

> We agree with the district court that the evidence was insufficient to establish actual harm for the 3,700 inmates for whom damages were awarded. While the evidence does not support a finding of consequential damages, nominal damages are appropriate.

Id. at 844.

There was ample evidence that the denial of adequate out-of-cell exercise and showers was medically unacceptable and created a substantial threat of mental and physical injury to inmates. The jury was justified in finding that plaintiffs were subjected to cruel and unusual punishment. Because the jury declined to award substantial compensatory damages, the adequacy of plaintiffs' evidence of damages is not at issue. Whether or not plaintiffs proved actual damages, nominal damages were appropriate. The jury's verdict cannot be set aside for lack of adequate evidentiary support.

B. Defendants' Motion for a New Trial

Defendants contend that the court should have stricken all of plaintiffs' testimony about the physical and mental effects of solitary confinement upon them, arguing that there is no evidence that the challenged conditions of confinement caused the effects plaintiffs reported.

Defendants acknowledge that the expert testimony, construed in light most favorable to plaintiffs, establishes that the challenged conditions "might, could, or are likely to" cause the effects plaintiffs complain of. Defendants' Memorandum of Law at 14, 17-18. From this testimony, along with plaintiffs' testimony that their ailments first occurred in the segregation unit and improved when plaintiffs were released from segregation, the jury could infer that plaintiffs' ailments were caused by conditions in segregation. The evidence was properly considered.

Defendants argue that the court should not have permitted Dr. Shansky to express opinions about conditions at Stateville, because Dr. Shansky was not listed on the pretrial order as an expert witness. Dr. Shansky was listed as a witness in the pretrial order. He was not originally listed as an expert, just as Dr. Shuman, who gave expert testimony for defendants, was not listed as an expert. Dr. Shansky's title and his role in the Menard Panel Report, however, made it clear that Dr. Shansky would be asked medical questions which invariably involve opinions. Plaintiffs moved to amend the pretrial order to list Dr. Shansky as an expert witness on September 10, 1986. The court granted that motion at a pretrial conference.

Defendants claim that they were surprised by Dr. Shansky's testimony about Stateville. They had no reason to be surprised. The issue of Dr. Shansky's testimony was discussed at a pretrial conference. The court ruled that Dr. Shansky would be required to testify as an expert, and specifically noted that Dr. Shansky's expert opinion on the differences, if any between Menard and Stateville would be relevant to this case. Plaintiffs' counsel asked Dr. Shansky whether his opinion about shower and exercise restrictions at Menard was equally applicable at Stateville. The defendants could not have been surprised that plaintiffs asked this question.

Defendants knew what Dr. Shansky would say far better than plaintiffs did. Dr. Shansky testified that he had specifically informed defendant O'Leary that the shower policy in Stateville's segregation unit was medically unacceptable, and that Warden O'Leary promised to change that policy. Defendants' counsel were free to discuss this case with Dr. Shansky before trial, although they successfully opposed plaintiffs' attempt to take his deposition.

Acting pursuant to Fed. R. Evid. Rule 403, the court granted plaintiffs' motion *in limine* to exclude evidence of plaintiffs' past crimes not involving dishonesty or false statement. Pursuant to that ruling, plaintiffs Richmond and Pennie admitted their theft convictions but defendants

were not permitted to introduce evidence of the specific crimes (which did not involve dishonesty or false statement) for which the other plaintiffs were incarcerated. Defendants argue that this court had no discretion under Rule 403 to exclude evidence of plaintiffs' past crimes, not involving dishonesty and false statement, no matter how prejudicial that testimony might be. The Seventh Circuit has not decided this issue. *See Christmas v. Sanders*, 759 F.2d 1284, 1290-91 (7th Cir. 1985). But there is a line of authority which holds that Rule 403 can be invoked in civil cases to exclude evidence of a plaintiff's prior felony conviction. *Wierstak v. Heffernan*, 789 F.2d 968, 972 (1st Cir. 1986); *Radtke v. Cessna Aircraft Co.*, 707 F.2d 999, 1000 (8th Cir. 1983). *See also* authorities cited in *Christmas*, 759 F.2d at 1291.

Even if defendants were entitled to introduce evidence of plaintiffs' crimes, the exclusion was not prejudicial. The jury was told that all plaintiffs were convicted criminals who had also violated prison rules. There was testimony about how long they had been in prison and in segregation. Plaintiffs Pennie and Richmond testified about their theft convictions. Defendants also introduced evidence that Stateville is a maximum security prison for serious offenses, that 30% of the Stateville inmates were there for murder, and that most segregation inmates had been sent to segregation for assault.

The court also excluded evidence of the specific rule violations for which plaintiffs (other than Roger Pennie) were sent to segregation, for the same reason that it excluded evidence of the crimes for which plaintiffs were sent to prison: such evidence would have been more prejudicial than probative. It might have suggested to the jury that particular plaintiffs were evil men who did not deserve consideration of their crimes.

The ruling was made in response to the defendants' objection to Roger Pennie's testimony about the reasons for his confinement in segregation. Pennie testified that he was sent to segregation for attempted escape, and started

to testify that he was later acquitted of the escape charge in a criminal trial. Defendants objected to the latter testimony, because it suggested that Pennie was unjustly confined in segregation. The court sustained defendants' objection, and ruled that no further evidence of the reasons (or lack thereof) for plaintiff's confinement in segregation would be admitted.

Defendant O'Leary testified that some inmates were in segregation for murders committed in prison. Superintendent Romero and defendants testified at great length (and without objection) about the violent propensities of the segregation inmates; how they would run wild when let out of their cells, fight with each other and with guards and destroy prison fixtures. Defendants also introduced evidence that 30% of the inmates in Stateville are there for murder, that 70% are there for Class X or Class I felonies, that most of the inmates in segregation are there for assault, and that segregation inmates generally comprise "the worst of the worst."

Plaintiffs, far from trying to exclude this evidence, readily admitted it. Plaintiffs testified about the frequency of their visits to the adjustment committee, and about the bizarre and disruptive behavior of other inmates in segregation. On cross-examination they acknowledged that they had been sent to segregation for violation of prison rules. Professor McConville testified about the violent behavior of the segregation inmates (based on his interview with Roger Pennie) and opined that violent behavior often is caused by excessive isolation and idleness.

Defendants were not precluded from introducing evidence to support their claim that segregation inmates are violent, and that security concerns therefore justify shower and exercise restrictions. Furthermore, the court specifically ruled that defendants were entitled to show that particular plaintiffs had been "fractious" while in segregation, and therefore could not safely be allowed out of their cells for showers or exercise. Defendants were not prejudiced by the exclusion of the specifics of plaintiffs' rule violations.

Defendants complain that the court did not specifically instruct the jury that the A.C.A. and American Medical Association standards do not establish constitutional minima. Plaintiffs never suggested to the jury that the A.C.A. and American Medical Association standards were dispositive. From the start the jury was told to consider the totality of the circumstances. This court's instructions made clear that expert opinions were not dispositive and that the case was to be decided on the basis of the totality of the circumstances.

The court had no duty to go beyond the instruction it gave and explicitly reject a notion—that the American Medical Association and A.C.A. standards were dispositive—that had never been suggested in the course of the litigation. *Brandes v. Burbank*, 613 F.2d 658, 669 (7th Cir. 1980) ("The primary purpose of instructions is to tell the jury what the applicable law is rather than what it is not. . . . If the essential elements are imparted to the jury, the judge has performed the necessary task.").

It would have been a mistake to give the instructions proposed by defendants, since the instructions might have confused the jury or appeared to be a comment on the evidence intended to favor the defense. *Lenard v. Argento*, 699 F.2d 874, 890 (7th Cir.), *cert. denied*, 464 U.S. 815 (1983) ("Repetitious instructions which place undue emphasis on matters favorable to either side constitute reversible error.").

Defendants argue that the jury's verdict must have been an improper compromise because the jury found a constitutional violation and injury, but awarded each individual plaintiff only $3.00 in compensatory and $3.00 in punitive damages. There is nothing improper about a finding of constitutional violation and an award of nominal damages to particular individual plaintiffs. *Carey v. Piphus*, 435 U.S. 247, 264-67 (1978); *Ustrak v. Fairman*, 781 F.2d 573, 578 (7th Cir.), *cert. denied*, 107 S.Ct. 95 (1986); *Madison County Jail Inmates v. Thompson*, 773 F.2d 834 (7th Cir. 1985). Nominal damages are particularly appropriate where,

as here, the evidence of serious injury to the plaintiff class (e.g., suicide attempts, disproportionate use of medical services) was stronger than the evidence of serious injury to the individual plaintiffs. *Madison County Jail Inmates, supra* (evidence that "about ten percent of the population would react with significant emotional or mental difficulty" and "severe stress" justified award of nominal damages). Finally, plaintiffs' attorneys stated to the jury in final argument that they were more interested in the jury finding "cruel and unusual punishment" than in money damages—clearly inviting an award of nominal damages, but supportive of corrective relief.

II.

Qualified Immunity from Damages and the Application of the Eleventh Amendment

Defendants contend that they are individually immune from monetary damages through the application of qualified immunity. They argue that where application of constitutional rules requires balancing, in this case a review of the totality of conditions of confinement at a particular facility, the doctrine of qualified immunity is applicable since the law cannot be said to be clearly established.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Supreme Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Two years later, in *Davis v. Scherer*, 468 U.S. 183 (1984), the Court reaffirmed the holding in *Harlow* and stated:

> "[A]n official would not be held liable in damages under § 1983 unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation."

Davis, 468 U.S. at 194 (emphasis omitted).

The Seventh Circuit has held that

> [t]he words "clearly established . . . constitutional rights" may not be used to read the defense of immunity out of federal tort law by the facile expedient of stating constitutional rights in the most general possible terms, so that anyone who prevails on the merits of a claim based on (for example) the First Amendment's free exercise of religion clause, . . . can defeat the defense of immunity simply by pointing out that the right to the free exercise of one's religion has long been a clearly established constitutional right. The right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful.

Azeez v. Fairman, 795 F.2d 1296, 1301 (7th Cir. 1986).

The Seventh Circuit has found that "there is one type of constitutional rule, namely that involving the balancing of competing interests, for which the standard may be clearly established, but its application is so fact dependent that the 'law' can rarely be considered 'clearly established.' " *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 107 S.Ct. 172 (1986). The Court noted with approval *Murray v. Gardner*, 741 F.2d 434, 440 n.2 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985):

> Government officials must be granted the ability to pass unmolested through bogs of murky legal precedent. They must not become prey to every hypothesis of what the law might have come to forbid had it eventually developed along certain lines. When the law is clear, and an official's duties delineated, then he will not be able to rely on the immunity defense. But we must not and do not demand that every government official skilled in guessing the future path of the law.

The Court in *Benson* concluded that "whenever a balancing of interests is required, the facts of the existing case-law must closely correspond to the contested action before the defendant official is subject to liability . . . qualified

immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required." 786 F.2d at 276.

In denying defendants' motion to dismiss, this court reserved ruling on the constitutionality of the exercise and showers permitted plaintiffs. This court noted that "[a]s stated by the Seventh Circuit in *Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 3587 (1984), '[v]arious prison conditions do not exist in isolation. Rather, challenged conditions must be viewed in the light of other prison conditions that may aggravate or mitigate the effect of the challenged conditions.'" Memorandum Opinion and Order, September 13, 1984.

Constitutional entitlement by segregation unit inmates to more than one shower and one exercise period per week at Stateville was not clearly established law. Illinois law provides that "[a]ll institutions and facilities of the Department shall provide every committed person with access to . . . bathing facilities at least once each week. . . ." Ill. Rev. Stat. ch. 38, ¶ 1003-7-2(a), eff. August 31, 1979. State statutes are presumed to be constitutional. *North Shore Post No. 21 of the American Legion v. Korzen*, 38 Ill.2d 231, 230 N.E.2d 833 (1967).

In *Pinkston v. Bensinger*, 359 F. Supp. 95 (N.D. Ill. 1973), the court held that one hour of exercise and one shower per week did not constitute cruel and unusual punishment at Joliet. In *Preston v. Thompson*, 589 F.2d 300 (7th Cir. 1978), the Seventh Circuit held that the district court did not abuse its discretion when it issued a preliminary injunction which required prison officials at Pontiac to provide, *inter alia*, two showers a week and daily recreation to all inmates. The court stated that this might go beyond the constitutional minimum. The dissent stated a plan submitted by prison officials to provide one shower a week for all inmates "would appear to meet minimal constitutional standards." *Id.* at 306 (citing *Sostre v. McGinnis*, 442 F.2d 178, 186 (2d Cir. 1971)). In *Sostre*, hygienic conditions were found adequate where plaintiff

was allowed to shave and shower with hot water once each week and his cell had a sink with cold running water and he was provided with soap and a towel. 442 F.2d at 186.

In *Lightfoot v. Walker*, 486 F. Supp. 504 (S.D. Ill. 1980), the court found gross deficiencies in the health care system and environmental deficiencies at the Menard Correctional Center. One hour of exercise and one shower per week for segregation inmates at Menard was not medically acceptable. In *Dorrough v. Hogan*, 563 F.2d 1259 (5th Cir. 1977), the court affirmed the district court's finding that segregation inmates were not subjected to cruel and unusual punishment in being limited to two one-hour exercise periods a week. The district court had stated that "a court order requiring daily exercise is appropriate *when overall conditions are found to be sub-standard. . . .*" *Id.* at 1263 (emphasis added). In *Walker v. Mintzes*, 771 F.2d 920, 927 (6th Cir. 1985), the court found that differing circumstances from prison to prison explain minor differences in constitutionally required yard time.

Consequently, the minimum amount of showers and exercise constitutionally required depends on many facts including the adequacy of the health care delivery system, and the finding in *Lightfoot*, where health care was grossly deficient, did not clearly establish a constitutional standard for Stateville where health care delivery is not contested. Seventh Circuit cases support the position that *Lightfoot* does not establish a constitutional standard in the instant action. The Seventh Circuit has stated that "[i]n this circuit, we determine whether there have been 'serious deprivations of basic human needs,' . . . by examining the 'totality of the conditions of confinement.' " *French v. Owens*, 777 F.2d 1250, 1252 (7th Cir. 1985), *cert. denied*, 107 S.Ct. 77 (1986); *Smith v. Fairman*, 690 F.2d 122, 125 (7th Cir. 1982), *cert. denied*, 461 U.S. 946 (1983); *Madyun v. Thompson*, 657 F.2d 868, 874 (7th Cir. 1981).

In *Walker v. Mintzes*, 771 F.2d 920 (6th Cir. 1985), the Sixth Circuit affirmed the district court's order that prisoners in segregation be afforded one shower per week as

a constitutional minimum. The district court in *Walker* ordered that inmates in administrative segregation be given 30 minutes of yard time each week. The matter of yard time requirements was remanded for further consideration and clarification.

The Seventh Circuit recently found that segregation inmates who received exercise twice a week and spent one hour each week in the commissary were not subjected to "wanton and unnecessary infliction of pain" because they had to exercise in cramped quarters, and that the exercise period allowed was within the constitutional minimum. *French v. Owens*, 777 F.2d 1250, 1255-56 (7th Cir. 1985), *cert. denied*, 107 S.Ct. 77 (1986).

In a matter as fact-bound as this, it cannot be said that the defendants must have known that their conduct was in violation of clear constitutional precedent in this circuit. Accordingly, to the extent that defendants are sued in their individual capacity, they are entitled to qualified immunity from compensatory or punitive damages. The jury's damage verdicts must be set aside.

Insofar as defendants are sued in their official capacity, the action is one against the state, *Walker v. Rowe*, 791 F.2d 507, 508 (7th Cir.), *cert. denied*, 107 S.Ct. 597 (1986), and the eleventh amendment prohibits the imposition of damages, but prospective injunctive relief may be considered to restrain future constitutional violations. *Kentucky v. Graham*, 105 S.Ct. 3099, 3106 n.14 (1985). That is the relief being sought.

III.

Equitable Relief

The court may rely on the jury's findings of cruel and unusual punishment in deciding the merits of the claim for equitable relief. The legal liability fact issues decided by the jury are the same as the equitable liability fact issues. This court should accept the jury's findings as predicate for equitable relief after denying post-trial mo-

tions. *See Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1092 (7th Cir. 1986).

Defendants acknowledge that some change in their present exercise and shower policy "would be supported by the record and meet the constitutional minimum." Defendants' Memorandum in Opposition to Plaintiffs' Motion for Permanent Injunction, at 6.

Plaintiffs' request for three showers per week and five hours of out-of-cell exercise per week has ample support in the record. Dr. Ronald Shansky, Medical Director of the Department of Corrections, testified that to prevent physical and psychological deterioration, Stateville segregation inmates should be allowed at least three showers per week and five hours of out-of-cell exercise per week. The American Correctional Association standards also require three showers per week and five hours of out-of-cell exercise per week in the absence of a security emergency. Professor McConville testified that Stateville segregation inmates should be given an hour of out-of-cell exercise every day. The standards of the American Medical Association indicate "a daily minimum of one hour of exercise involving large muscle activity, away from the cell." Defendants are providing Menard segregation inmates with six hours of out-of-cell outdoor exercise per week and three showers per week.

Superintendent Romero testified that exercise yard security measures are "adequate" and that the segregation unit's exercise yards can hold 20 inmates at a time. There are about 200 inmates in the segregation unit. Also, shower facilities are readily accessible to segregation inmates' cells.

The proposed order would require five hours of out-of-cell exercise per week; other courts have ordered seven hours of out-of-cell exercise per week. *Campbell v. Cauthron*, 623 F.2d 503, 507 (8th Cir. 1980) ("each inmate that is confined to his cell for more than sixteen hours per day shall ordinarily be given the opportunity to exercise for at least one hour per day outside the cell"); *Bono v.*

Saxbe, 462 F. Supp. 146, 149 (E.D. Ill. 1978) (ordering "that inmates in the Marion Control Unit be provided a minimum total of seven (7) hours per week for physical exercise"), *aff'd in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980).

The injunction would apply only to segregation inmates confined for periods of 90 or more consecutive days. Dr. Shansky testified that inmates confined for more than one week need five hours of out-of-cell exercise per week. Many courts have ordered daily exercise for prisoners confined for periods of four days or less. *Ruiz v. Estelle*, 679 F.2d 1115, 1151 (5th Cir. 1982) ("each inmate must be afforded the opportunity for at least one hour of exercise a day if he is in administrative segregation for more than three consecutive days"); *Hutchings v. Corum*, 501 F. Supp. 1276, 1294, 1279 (W.D. Mo. 1980) ("in order to avoid inhumane conditions a minimum of one hour of exercise per day for each inmate outside the cell must be provided" although most prisoners were incarcerated for only one to three days).

The proposed order would not apply during temporary emergencies and lockdowns which unfortunately are not unusual at Stateville given the nature and size of the population. There would also be an exception for fractious inmates. These exceptions are reasonable. *Conklin v. Hancock*, 334 F. Supp. 1119, 1120, 1122 (D.N.H. 1971) (holding that even though the plaintiff was "a high security risk" who had allegedly killed a guard in an escape attempt, he must be allowed a daily shower and a "daily fresh air exercise period of at least one hour").

Based on the record before the court, the proposed relief is appropriate and should be granted. The elimination of cruel and unusual punishment is not only required by the Constitution, it is good penal practice. The recoil of cruel and [sic] punishment is more crime, violence and injury to individuals and to society.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

(1) Plaintiffs' motion to amend their complaint to conform to the evidence and sue defendants Lane and O'Leary in their official capacity is granted.

(2) Defendants' motions for a directed verdict, judgment notwithstanding the verdict and for a new trial are denied.

(3) Defendants individually are entitled to qualified immunity from damages and, in their official capacity, the eleventh amendment prohibits the imposition of damages. The jury's verdicts of compensatory and punitive damages are set aside.

(4) Within 60 days after this order becomes final either by expiration of the time to appeal or after appeal and review, the following mandatory injunction shall take effect:

> Except in temporary emergencies and institutional lockdowns, defendants Michael Lane and Michael O'Leary, and their successors in the offices of Director of the Illinois Department of Corrections and Warden of Stateville Correctional Center, shall provide every Stateville segregation inmate who has been confined in segregation for 90 or more consecutive days the opportunity to shower at least three times each week and to exercise outside of his cell at least five hours each week; *provided, however,* that if a segregation inmate violates prison rules during his exercise or shower period, he may be denied the exercise or shower rights provided herein for a reasonable period of time pursuant to regulation approved by this court; *provided, further,* that other reasonable exceptions to the shower and exercise rights established herein may be created pursuant to regulations approved by this court; *provided, further,* that instances of denial of minimum shower and exercise periods must be documented.

(5) The court retains jurisdiction of the subject matter and the parties to enforce or modify this injunction.

(6) Plaintiffs may apply for attorneys' fees and costs within 60 days.[2]

ENTER:

/s/ WILLIAM T. HART
United States District Judge

Dated: Jan. 30, 1987

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[2] Daniel M. Harris and Mitchell D. Raup of the firm of Mayer, Brown & Platt and Joseph N. DiNatale and Edmund P. Wanderling of the firm of DiNatale & Montemurro were appointed to represent the plaintiff class. Appointed counsel provided excellent professional services on behalf of the plaintiffs.

Supreme Court, U.S.
FILED
SEP 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-331

In The
Supreme Court of the United States
October Term, 1988

MICHAEL LANE, MICHAEL O'LEARY, and
RICHARD W. DeROBERTIS,

Petitioners,

v.

JAMES DAVENPORT, CHARLES RICHMOND,
HECTOR RIVERA, CARL LUCAS,
ROGER PENNIE, CHARLES TERRY,
and MARK McBRIDE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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26 pp

QUESTION PRESENTED

Whether the court of appeals properly accepted, for purposes of this case only, petitioners' concession that cruel and unusual punishment was a question of fact, where petitioners had consistently argued that cruel and unusual punishment was a question of fact and where petitioners' sole argument on appeal was that the district court's findings of fact were clearly erroneous.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	14
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES:

Campbell v. Cauthron, 623 F.2d 503 (8th Cir. 1980) 20

City of Springfield v. Kibbe, 107 S. Ct. 1114 (1987) 19

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 19

Frazier v. Ward, 426 F. Supp. 1354 (N.D.N.Y. 1977) 21

French v. Owens, 777 F.2d 1250 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 77 (1986) 20

Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) 20

Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979) 20

Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854 (4th Cir. 1975) 21

STATUTE:

28 U.S.C. § 1254(1) 2

MISCELLANEOUS:

Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450 (1983) 5, 13

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1-13) is reported at 844 F.2d 1310 (7th Cir. 1988).

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1988 and modified on rehearing on May 23, 1988. The petition for certiorari was apparently filed on August 22, 1988 and received by respondents on or about August 24, 1988. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

See Petition for Certiorari at 2.

STATEMENT OF THE CASE

1. Respondents filed this class action on behalf of a class of prisoners confined in the solitary confinement ("segregation") unit of the Stateville Correctional Center in Joliet, Illinois for more than 90 consecutive days. The complaint charged that the living conditions in the unit for these inmates were so substandard as to constitute cruel and unusual punishment, violative of the Eighth Amendment of the United States Constitution. Plaintiffs sought damages individually and equitable relief on behalf of the class. The legal and equitable issues were tried to a jury for two weeks in September, 1986.

2. The case centered on Stateville's shower and exercise rules. Stateville permitted segregation inmates only

one hour of out-of-cell exercise per week and one shower per week. Every federal penitentiary, and every American prison known to the expert witnesses who testified at trial, allows segregation inmates to exercise outside their cells substantially more often. Plaintiffs presented evidence that in the totality of the circumstances Stateville's exercise and shower restrictions were severe, unusual, psychologically harmful, and physically harmful to inmates confined more than 90 consecutive days.

a. Plaintiffs testified as to the regimen in the Stateville segregation unit. Inmates were locked in their cells virtually 24 hours a day, seven days a week. Their only regular relief from this isolation was a one-hour exercise period in a fenced outdoor yard once a week, and a ten-minute shower once a week. Tr. 3, 8, 19, 569-570.[1] Inmates occasionally were allowed out of their cells to see visitors, work in a cage in the law library, go to an administrative hearing, or go to the hospital. Tr. 16. All told, segregation inmates spent a maximum of two or three hours per week outside their cells. Tr. 38. Some of the named plaintiffs spent two and a half to three years in solitary confinement.

b. Dr. Ronald Shansky, who was Medical Director of the Illinois Department of Corrections at the time of trial, testified that, in his opinion, permitting inmates only one shower and one hour of exercise per week was "not a medically acceptable frequency or duration of exercise or showers and promote[d] deterioration of the mental and physical status of residents within the unit." Plaintiffs'

---

[1] "Tr." refers to the trial transcript.

Exhibit 3, pages 21-22; Tr. 742-785. He opined that one hour per week of exercise was "insufficient to maintain a healthful status" (Tr. 753), and that the probable results of the exercise policy included "deterioration of the heart," "hardening of the arteries," "muscle atrophy, joint stiffness, and bone demineralization." Tr. 753. Dr. Shansky also testified that lack of exercise and "lack of social contact" in solitary confinement can cause some prisoners to "become depressed," while "others may become more angry and hostile, as a result." Tr. 754-55. In addition, Dr. Shansky testified that in his experience as Medical Director of the Illinois Department of Corrections, "lack of exercise will increase the demand for medical services"; he considered this correlation "well documented." Tr. 754.

c. Plaintiffs introduced the American Correctional Association's *Standards for Adult Correctional Institutions* which require, as "essential" standards, that segregation inmates "have the opportunity to shave and shower at least three times per week," and that "inmates in segregation receive a minimum of one hour per day, five days per week, of exercise outside their cells." Plaintiffs also presented the American Medical Association's *Standards For Health Services In Prisons* which require that "each inmate [be] allowed a daily minimum of one hour of exercise involving *large muscle activity*, away from the cell." In addition, plaintiffs presented a 1976 report of a court-appointed panel of medical experts, which had condemned a similar exercise and shower policy then employed by the Menard Correctional Center in Illinois. (The practice was changed pursuant to court order.) The report stated in pertinent part:

> Residents of segregation are permitted one shower and one hour of exercise per week in a small exercise yard. In the view of the panel, this is not a medically acceptable frequency or duration of exercise or showers and promotes deterioration of the mental and physical status of residents within the unit. Apparently the exercise and shower provisions are not based on any known correctional standard but simply reflect a shortage of correctional officers to provide supervision of the residents.

Plaintiffs' Exhibit 3, pages 21-22.

d. Dr. Sean McConville, a professor of criminal justice at the University of Illinois specializing in penology, testified that excessive isolation in solitary confinement is known to be psychologically dangerous. In the early 1800's, the first experiments with solitary confinement in the United States "had to be abandoned after a few years because of the incidence of insanity. People could not take it." Tr. 852. Solitary confinement in British prisons also had to be abandoned "because a great number of people became insane." Tr. 853. Current academic literature reached similar conclusions. For example, one article upon which Dr. McConville relied concluded that "it is clear that the use of solitary confinement carries major psychiatric risks." Tr. 861, quoting Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450, 1454 (1983).

Dr. McConville further testified that penologists and prison officials found regular out-of-cell exercise to be "one of the most central means of mitigating" the adverse effects of prolonged isolation and idleness. Tr. 848. For this reason, the general practice in maximum security pris-

ons in western countries is to permit prisoners to exercise outside their cells five to seven hours a week. Tr. 848-49; 855-57. In the United States, all federal penitentiaries allow inmates in segregation to exercise outside their cells five hours a week. Tr. 855. Dr. McConville was not aware of *any* prison that limited segregation inmates to only one hour per week of exercise, except for Stateville Correctional Center. Tr. 857.

Dr. McConville opined that prisoners in the Stateville segregation unit were not receiving adequate exercise opportunities. Tr. 877-918. Professor McConville also said that subjecting segregation inmates to excessive isolation and idleness creates "dangers of affecting people's health, their mental stability, and dangers of turning them into . . . people who instead of being deterred from crime or encouraged away from crime, bear a hardened—a reinforced sense of grievance against society." Tr. 845.

e. Dr. Jay Harness, an expert witness for defendants, admitted on cross-examination that out of the dozens of prisons he had visited in his career as a prison health care administrator, none except Stateville restricted inmates to only one hour of out-of-cell exercise per week. Tr. 1038-39. Dr. Harness also testified that "the minimum [exercise] standard," which "is well documented in the medical literature," is "aerobic exercise . . . in large muscle groups . . . half an hour five out of seven days." Tr. 1035.

f. Gilberto Romero, the Superintendent of the Stateville Segregation Unit, testified that yard space and security procedures were adequate (Tr. 655), and that he could, if ordered to do so, safely provide exercise for each segregation inmate five days a week. Tr. 662.

g. Dr. Harry Shuman, the medical director of Stateville at the time of trial, testified that inmates in the Stateville segregation unit consumed an average of 25% more medical services per person than inmates in the general population in Stateville, and that "in some months it has been much higher than that." Tr. 1081-82.

h. Stateville medical records confirmed the relatively poor health of the segregation inmates. Although segregation inmates comprised only about 10% of the total prison population in Stateville, they consistently needed a much higher percentage of physician assistant visits (generally, between 15 and 30 percent). Tr. 1055-58.[2]

i. Dr. Terry Brelje, a clinical psychologist (Tr. 1099) who testified for defendants, admitted that psychologists have found correlations between "prolonged isolation" and such serious psychological problems as people "imagin[ing] things happening that weren't happening" (Tr. 1127), "[m]assive free-floating anxiety" (Tr. 1127), "[h]yperresponsivity to external stimuli" (Tr. 1128), "[p]erceptual distortions, hallucinations" (Tr. 1128) and the "emergence of primitive ego—d[y]stonic fantasies." Tr. 1128.

j. Plaintiffs' testimony was consistent with the experts' predictions. Roger Pennie testified that while in segregation he "was breaking out in body rashes" (Tr.

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[2] Segregation inmates who have medical complaints are first seen by a certified medical technician. Tr. 1053. If the medical technician finds there is a problem and is unable to treat the problem himself, the inmate is referred to a physician's assistant. Tr. 1054.

50) and "suffering from severe headaches" (Tr. 53), although he had not had either problem before going to segregation. Tr. 54. James Davenport testified that while in segregation he developed rashes (Tr. 124) and his head hurt "all the time." Tr. 126. Hector Rivera testified that while in segregation he developed rashes on his chest and back. Tr. 217. Charles Terry testified that while he was in segregation he started developing sores on his back, legs, groin area and feet. Tr. 288. Mark McBride developed a rash while in segregation (Tr. 339) and Carl Lucas developed a rash and chest pains. Tr. 382.

The plaintiffs also complained about psychological and sleep disorders. Roger Pennie, who had been sent to prison for fraudulent use of a credit card (Tr. 34), testified that while in segregation he began to think "everybody was against me, my family in particular and they wasn't . . . and I threatened people, I called them all kinds of names." Tr. 55. At night Pennie barely slept at all (Tr. 56); instead, he thought about hurting his family and "[g]etting even." Tr. 57. Pennie further testified that while in segregation, "I noticed I had gotten violent . . . I was always thinking somebody wanted to do something to me and I was contemplating being able to do something to them first, when nobody wanted to do nothing to me." Tr.59.

James Davenport testified that while in segregation, "I wanted to hurt myself . . . maybe kill myself," although he had not had suicidal thoughts before. Tr. 126. He also had "dreams of people killing me and things, you know, being hurt by others, that is whenever I went to sleep." Tr. 128. Hector Rivera testified that while

in segregation "I used to, you know, dream about falling down the stairs, I used to dream about snakes coming to get me on top of the bed." Tr. 224. Around the fourth month in segregation Rivera began to think about "hanging myself." Tr. 226. Carl Lucas testified that while in segregation he had dreams of being beaten and stabbed (Tr. 386-7) and Charles Richmond testified that while in segregation he began to have violent fantasies. Tr. 435.

Mark McBride, who went into segregation in apparently good mental health (Tr. 336), testified that during his first six months in segregation "I was having bad dreams that would wake me up at night." Tr. 339. McBride testified that after eight months in segregation "I started hearing voices" (Tr. 342) which McBride thought came from "a transmitter or microphone in one of the fillings in my mouth." Tr. 342. McBride said the voices were "threatening me I shouldn't go outside, that there were deaths in my family." Tr. 343. The voices continued "[a]t all times of the day." Tr. 344. Although McBride was confined alone, he testified that once "when I woke up it was dark and there was a lady in my cell. She had a hair net on and maybe a stocking cap." Tr. 345. McBride said that another time the voices "told me to let me kill Richmond" (Tr. 346), another inmate.

McBride also testified that "on one occasion with the threatening of the voices I was afraid, I yelled out the window for help" (Tr. 354) and "I started to set some papers on fire to get the polices' attention." Tr. 354. McBride said that he did not set the fire but somebody else in his cell did (Tr. 354), although he was confined

alone in his cell. McBride further testified that the voices "told me to commit suicide" and "to do some gross things like eat my waste." Tr. 360. After 18 months in the Stateville segregation unit McBride was transferred to the Psychiatric Unit in Menard. Tr. 358, 104.

Plaintiffs also described abnormal behavior by the other inmates. Roger Pennie testified that he saw an inmate who set fire to his mattress, lying "upon his mattress and it was on fire." Tr. 61. Another time he saw an inmate try to hang himself with a blanket. Tr. 63. Hector Rivera testified that he saw inmates break windows and set fires in their cells. Tr. 231-32. On one occasion, he saw officers go into a cell and "they brung out the guy and he was unconscious and they handcuffed him and they just dragged him and took him downstairs." Tr. 231. James Davenport testified that he once saw a young man "burn himself up." Tr. 146. Another time he saw McBride pile up paper in a corner of the cell, set it on fire and while "playing in the fire, said he was going to kill himself." Tr. 147. On another occasion, Davenport saw "a young man put a rope about his neck that he had made and he jumped off his stool." Tr. 148. Carl Lucas recalled that there were fires in the cells every week. Tr. 390. Davenport said that he had "seen a lot of them [segregation inmates] make suicide attempts by cutting their wrists." Tr. 149. Davenport testified that altogether he had witnessed "maybe about 20 or 30 or more" suicide attempts while he was in segregation. Tr. 148.

3. After a two-week trial, the jury returned a verdict in favor of all plaintiffs, and awarded compensatory

and punitive damages against all defendants. In answer to special interrogatories, the jury found that:

(1) Under the totality of the circumstances, the defendants' practice of allowing inmates in solitary confinement only one shower per week constitutes cruel and unusual punishment.

(2) Under the totality of the circumstances, the defendants' practice of allowing inmates in solitary confinement only one hour of out-of-cell exercise per week constitutes cruel and unusual punishment.

(3) Each defendant was personally responsible for the imposition of cruel and unusual punishment.

(4) Each defendant acted with deliberate indifference or reckless disregard for the health and well-being or constitutional rights of each named plaintiff.

(5) Each named plaintiff sustained injury or damages.

(6) Each defendant's conduct was the proximate cause of each named plaintiff's injury or damage.

(7) There exists a pattern or custom of the defendants which has resulted in the denial of plaintiffs' rights to be free from cruel and unusual punishment. Tr. 1362-1366.

4. After trial, both sides declined Judge Hart's offer to conduct an evidentiary hearing on the issue of equitable relief, and agreed to submit the question of equitable relief to the Court on the record made at trial and on post-trial briefs. 653 F. Supp. at 652. In his opinion dated January 30, 1987, Judge Hart (1) denied defendant's

motions for judgment N.O.V. and new trial;[3] (2) set aside the jury's damage awards, holding that the defendants were entitled to qualified immunity from damages;[4] and (3) entered an injunction requiring the defendants (and their successors in office) to allow the members of the plaintiff class to exercise outside their cells at least five hours each week, and to shower at least three times each week, subject to exceptions contained in the Order.[5]

5. On appeal, petitioners challenged the district court's entry of the permanent injunction on the ground that the decree was based "upon improper and misstated findings" which "were 'clearly erroneous' within the meaning of Fed. R. Civ. P. 52(a)." Brief and Argument

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3 Defendants did not appeal from this decision.

4 Plaintiffs did not appeal from this decision.

5 Judge Hart's order is as follows:

"Except in temporary emergencies and institutional lockdowns, defendants Michael Lane and Michael O'Leary, and their successors in the offices of Director of the Illinois Department of Corrections and Warden of Stateville Correctional Center, shall provide every Stateville segregation inmate who has been confined in segregation for 90 or more consecutive days the opportunity to shower at least three times each week and to exercise outside of his cell at least five hours each week; *provided, however,* that if a segregation inmate violates prison rules during his exercise or shower period, he may be denied the exercise or shower rights provided herein for a reasonable period of time pursuant to regulation approved by this court; *provided, further,* that other reasonable exceptions to the shower and exercise rights established herein may be created pursuant to regulations approved by this court; *provided, further,* that instances of denial of minimum shower and exercise periods must be documented."

653 F. Supp. at 664.

for Defendants-Appellants 15. As the court of appeals noted, petitioners did *not* argue that the ultimate question in an Eighth Amendment case is a question of law for the judge to decide. App. 2. Nor did they ask for *de novo* review of the evidence.

After reviewing the record carefully, the Seventh Circuit, in an opinion by Judge Richard Posner, held that there was ample evidence to justify the district court's decree with respect to the exercise issue. "Confinement in Stateville's segregation unit involves considerable isolation, sometimes for protracted periods; and the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total." App. 5. "With only one hour of exercise outside the cell a week and only two other hours outside the cell, an inmate spends 165 out of 168 hours in a 90-square-foot cage. That is too little, or so at least the district judge could find without committing a clear error." App. 8.

Judge Posner took a different view on the shower issue, holding that the district court's finding of fact on that matter was clearly erroneous. Again Judge Posner reviewed the record carefully and even went beyond it to take judicial notice of the state of the academic literature on the subject.

> While there is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant), see, e.g., Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450 (1983), we have not found any corresponding literature on the effects

of limiting the number of showers that prisoners may take.

App. 11. Accordingly, the court of appeals vacated the portion of the district court's decree requiring more shower opportunities for segregation inmates.

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REASONS FOR DENYING THE PETITION

Petitioners ask this Court to grant certiorari on the question: "Whether the determination that conditions of incarceration violate the Eighth Amendment's proscription against cruel and unusual punishment is a question of law subject to *de novo* review by a court of appeals." For a number of reasons, this question is not appropriate for certiorari review.

1. Petitioners are challenging a decision which the Seventh Circuit never made, on an issue which they never raised. The court of appeals did not hold that cruel and unusual punishment was a question of fact. Nor did the court of appeals hold that cruel and unusual punishment was a question of law. The Seventh Circuit simply said that since petitioners had conceded that cruel and unusual punishment was a question of fact it would be treated as such for purposes of this appeal. The statement has no precedential effect beyond this case. It was simply a passing observation that petitioners had waived a possible argument.

Besides being waived the argument that petitioners now seek to advance is purely academic; it has no bearing

on the outcome of the present case. Petitioners argue that the Seventh Circuit properly reviewed the district court's subsidiary findings of fact under the clearly erroneous standard, but should have exercised its own independent judgment on the ultimate fact of whether those subsidiary findings added up to cruel and unusual punishment. Petitioners reason that "[o]nce the subsidiary facts of the conditions of incarceration have been found, the ultimate question of whether such conditions are unconstitutional is unrelated to witness credibility." Petition for Certiorari 8.

This distinction between subsidiary and ultimate facts may be of practical significance in some cases, but it is not here. Petitioners have never denied that the district court's "subsidiary" factual findings, if correct, justify the conclusion that the Eighth Amendment was violated. The district court found these "subsidiary" facts:

1. "that limiting inmates to one hour per week of out-of-cell exercise is 'medically unacceptable' because it can lead to deterioration of the cardiovascular system, hardening of the arteries, atrophy of muscles, musculo-skeletal problems, and adverse psychological effects." App. 24.
2. that inmates in Stateville's segregation unit "were less healthy than inmates in the general population." App. 23.
3. "that Stateville's segregation unit allows inmates far less out-of-cell exercise than other segregation units in maximum security prisons." App. 24.
4. that "no other prison in a civilized country," known to the experts who testified at trial, "limits inmates to one hour of exercise per week." App. 24-25.

5. "that limiting inmates to one hour per week of out-of-cell exercise carries grave risks with no penological justification." App. 24.

6. "that there is a correlation, noted in the professional literature, between prolonged isolation and various psychopathological symptoms." App. 24.

7. that the named plaintiffs experienced medical and psychological ill effects while in segregation and "witnessed bizarre and self-destructive behavior of other inmates in segregation." App. 23.

8. that the denial of adequate out-of-cell exercise "was medically unacceptable and created a substantial threat of mental and physical injury to inmates." App. 28.

Although petitioners vehemently attacked these subsidiary findings, they always acknowledged that the findings, if true, would add up to cruel and unusual punishment. That ultimate issue—whether it be one of law or fact—was never in dispute. While the proper classification of this ultimate issue as a question of law or a question of fact (the question on which petitioners seek certiorari) may be an interesting academic exercise, its resolution has no bearing on the outcome of this case.

Moreover, the court of appeals did exercise its independent judgment on whether the district court's subsidiary findings of fact added up to a constitutional violation. To the extent there was any deference, it was to the district court's findings of the underlying facts—a deference that petitioners have always acknowledged as proper.

2. Certiorari should also be denied because, as the court of appeals found, petitioners waived the argument that cruel and unusual punishment is a question of law,

rather than a question of fact. In the lower courts, petitioners consistently argued that cruel and unusual punishment is a question of fact. Indeed, they were the ones who wanted the question submitted to a jury, and they proposed jury instructions defining cruel and unusual punishment (which Judge Hart gave in substance). Moreover, petitioners never asked for *de novo* review of the evidence. Rather, they sought review under some form of a clearly erroneous standard.

In their post-trial JNOV motion, for example, petitioners argued that the "jury's verdict was contrary to the clear weight of the evidence." Defendants' Memorandum of Law in Support of Motion for Directed Verdict, Judgment Notwithstanding the Verdict or in the Alternative, New Trial 4. Petitioners went on:

> The standards applicable to a motion for directed verdict and judgment notwithstanding the verdict are the same. All the evidence, taken as a whole, must be viewed in the light most favorable to the nonmoving party. This evidence must provide a sufficient basis from which the jury could have reasonably reached a verdict without speculation or drawing unreasonable inferences which conflict with the undisputed facts.

Id. at 4.

> The existence of a mere scintilla of evidence supporting plaintiff's position is insufficient. . . . There must exist evidence on which the jury could reasonably find for plaintiff.

Id. at 5.

> There was absolutely no evidence from which a jury could reasonably have determined that defendants[']policies caused the unne[ce]ssary and wanton

> infliction of pain on plaintiffs. Such a determination could only be based on speculation or conjecture.

Id. at 10.

> Construed in the light most favorable to plaintiffs, the evidence establishes that the segregation conditions might cause psychological harm.

Id. at 14.

> The question is whether plaintiffs put in enough evidence to justify the jury's special verdict. . . . Once again, the evidence and all reasonable inferences drawn therefrom, viewed in the light most favorable to plaintiff is such that reasonable persons could not have reached different conclusions based on the quality and quantity of evidence required.

Id. at 15.

> [T]he jury's findings of a constitutional violation, actual injury, and punitive damages are all contrary to the clear weight of the evidence.

Id. at 21.

In the Seventh Circuit, defendants argued that the district court's findings of fact were clearly erroneous and therefore did not support its conclusion that petitioners subjected respondents to cruel and unusual punishment. Defendants did not argue that the findings of fact, if true, failed to add up to a constitutional violation. Nor did they ask the Seventh Circuit to review the underlying evidence on a *de novo* basis. *See* Brief and Argument for Defendants-Appellants:

> The district court found that the legal issues herein are extremely fact-bound. 653 F. Supp. 649, 662. The decision of the district court rests upon generalized findings of fact relating to conditions as they had previously existed and as they presently exist at State-

> ville Correctional Center. The Defendants contend that the district court's conclusions of law as to the ultimate issues in this case are based upon improper and misstated findings. As such, those findings were 'clearly erroneous' wtihin the meaning of Fed. R. Civ. P. 52(a).

Id. at 14-15.

> The district court failed to make one positive finding with regard to I-House but focused on plaintiffs' pejorative testimony, the personal opinions of experts, irrelevant evidence, and erroneous finding of fact.

Id. at 26.

> There was substantial evidence presented which was ignored or misstated throughout the court's fact-finding process. Thus, the court's findings are clearly erroneous.

Id. at 46.

Petitioners cannot complain in this Court that the lower courts followed the standard of review which petitioners asked them to use, rather than some other not-quite-specified standard of review which petitioners never asked them to use. This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe,* 107 S. Ct. 1114, 1115 (1987); *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981) ("[a]lthough defendant's petition for certiorari presented the question of the District Judge's abuse of discretion . . . that question was not raised in the Court of Appeals and is not properly before us").

3. Petitioners also seek certiorari on whether the Seventh Circuit properly found that petitioners had waived the argument that cruel and unusual punishment

is a question of law by consistently taking the opposite position. This question is not worthy of the Court's attention since it has no significance beyond the present case and, indeed, has no practical importance in this case either. Besides, the court of appeals' finding of waiver was correct.

Moreover, despite petitioners' concession, the Seventh Circuit did in fact conduct a searching review of the record, and indeed went beyond the record to survey the professional literature and the case law in the area. The court of appeals did not hesitate, after this review, to hold the district court's findings on the shower issue to be clearly erroneous. On the exercise issue, Judge Posner held that the district court findings as to the harmfulness of petitioners' exercise policies were supported by the record, the case law and the professional literature and "anyway seem[ed] pretty obvious." App. 5.

4. Finally, petitioners seek certiorari on the question: "Whether petitioners denied respondents their right to be free from cruel and unusual punishment under the Eighth Amendment as a matter of law." Petitioners present no reasons why this Court should consider that question, and may have abandoned the point. In any event, Judge Posner's opinion explains why there was a constitutional violation and his opinion is consistent with a host of other lower court decisions. *See, e.g., French v. Owens,* 777 F.2d 1250, 1255-56 (7th Cir. 1985), *cert. denied,* 107 S. Ct. 77 (1986); *Ruiz v. Estelle,* 679 F.2d 1115, 1151-52 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983); *Campbell v. Cauthron,* 623 F.2d 503, 507 (8th Cir. 1980) (pretrial detainees); *Spain v. Procunier,* 600 F.2d 189, 199-200

(9th Cir. 1979); *Sweet v. South Carolina Dep't of Corrections,* 529 F.2d 854, 865-66 (4th Cir. 1975); *Frazier v. Ward,* 426 F. Supp. 1354, 1367-69 (N.D.N.Y. 1977).

CONCLUSION

Because of the foregoing the petition for a writ of certiorari should be denied.

Respectfully submitted,

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